NO. 48836-1

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

TACOMA SCHOOL DISTRICT, NO. 10.,
d/b/a TACOMA PUBLIC SCHOOLS,,

Appellant and Cross-Respondent,

v.

III BRANCHES, PLLC, KATHY MCGATLIN;
SHEILA GAVIGAN; TRUBY PETE,

Respondents and Cross Appellants.

III BRANCHES, PLLC, TRUBY PETE, SHEILA GAVIGAN AND KATHY MCGATLIN - RESPONDENTS' BRIEF AND OPENING BRIEF ON CROSS APPEAL

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I. INTRODUCTION

The District continues to violate the First Amendment rights of Truby Pete, Kathy McGatlin, Sheila Gavigan, ("Lincoln Ladies"), and their attorney with this appeal. The District's lawsuit is a strategic lawsuit against public participation ("SLAPP"), which is apparent from the District's demands for an order compelling the Lincoln Ladies and their attorney to identify confidential attorney-client communications by segregating the specific documents the Lincoln Ladies shared with their attorney, and in what form, when they filed their whistleblower complaint against the District. This Court like the trial court should deny the District such relief.

Prior restraints on the Lincoln Ladies' rights to seek counsel and interference with their attorney's ability to advise them confidentially is unconstitutional. Invading the confidential attorney-client relationship is also unethical. The appellate court should sanction the District with an award of attorney's fees, costs, and forty thousand dollars in statutory penalties under Washington's anti-SLAPP statute, RCW 4.24.510. The Lincoln Ladies and their attorney do not have any records the District does not have. Protected cumulative files have not been compromised, nor inappropriately accessed. The records copied to the District are

sequestered and will be destroyed upon resolution of the underlying and corresponding whistleblower cases in conformance with well accepted practice standards specific to confidential information routinely managed by these educators and by the involved attorney who is an officer of the court.

II. ASSIGNMENTS OF ERROR AND ISSUE STATEMENTS

A. Restatement of Issues on District's Appeal

1. Did the trial court appropriately protect the First Amendment rights of the Lincoln Ladies when ruling segregation of the records shared with counsel violates attorney-client confidences?

2. Did the trial court correctly recognize that educators who share limited information with private counsel for purposes of blowing the whistle on governmental misconduct are not disclosing protected records in violation of student confidentiality or FERPA?

B. Assignments of Error on Cross Appeal

1. Did the trial court err in failing to rule on immunity under RCW 4.24.510?

2. Did the trial court err in failing to award attorney's fees, costs, and the statutory penalties under RCW 4.24.510?

Issues on Assignment of Error on Cross Appeal

1. Did the District file a SLAPP suit and an amended SLAPP suit?

2. Is an attorney part of the judicial branch of state government as an officer of the court?

3. Are attorney's fees, costs, and penalties mandatory?

III. STATEMENT OF THE CASE

The District filed this SLAPP suit against the Lincoln Ladies and their attorney knowing confidential student records were not at risk of disclosure.[1] The District knew this because Superintendent Santorno and General Counsel McMinimee received the whistleblower complaint with attachments on August 28, 2014 and none of those documents revealed the identity of any student.[2] The District also knew this because the Lincoln Ladies and their attorney told its officials confidential records were not improperly disclosed on September 3, 2014 at the District's investigative meeting.[3] The District further knew this because King 5 spoke to General Counsel McMinimee and affirmed for her in writing that it did NOT receive any confidential student records when covering its story.[4] Finally,

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[1] CP 1 - 3 (Complaint citing to sharing of whistleblower documentation with counsel, and the media), CP 596 (Amended Complaint citing Mell's communications with the court).

[2] CP 37 - 49 (Whistleblower Complaint w/e-mail to Santorno); and Supp. CP 677 - 722 (Whistleblower Complaint Attachments).

[3] CP 59 (E-mail to attend investigative meeting); CP 70 (Mell September 11, 2014 Ltr. Reporting District's Retaliation and Requesting Appointment of an ALJ); CP 102 - 105 (Mell Oct. 1, 2014 Ltr. affirming sequestration and requesting alternative dispute resolution or appointment of an ALJ).

[4] CP 542 (King 5 Oct. 2, 2014 Ltr); Students were never identified in any publication. CP 50 - 58.

the District knew this because the Lincoln Ladies sequestered the records, yet the District pursued litigation anyway.[5] What the District always intended with this lawsuit was to disqualify counsel and invade the confidential and protected attorney client relationship.[6] The District never sued the media outlets to retrieve the records it claims the media had. The District filed a formal lawsuit against three whistleblowers and their attorney, and rejected all other less invasive measures offered.[7] The District still continues to litigate this matter even though the Lincoln Ladies and their attorney duplicated what copies they had without redactions and gave the records to the District in December of 2014.[8]

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[5] CP 104 (Mell Oct. 1, 2014 Ltr.) and later in court at CP 651.; CP 106 - 107 (McMinimee Oct. 2, 2014 Ltr. rejecting appointment of a mediator and ALJ and insisting upon court intervention.); RP 11/21/14 at 13.

[6] CP 37 (RP Nov. 7, 2014 - "Every record that these three plaintiffs handed to their attorney need to be turned over to you redacted or unredacted — including unredacted portions."; CP 43 (RP Nov. 14, 2014 - "Ms. Mell: I cannot isolate records that are provided to me without breaching my privilege…The Court: Is that what you're asking for, Mr. Patterson? Mr. Patterson: I am Your Honor.") CP 652 (Order on Summary Judgment: "The District then explained that it was ***seeking return of the unredacted client-provided documents and any original documents*** McGatlin, Gavigan and Pete had ***subsequently provided to attorney Mell, as only these disclosures were FERPA violations***." CP 653 (Order on Summary Judgment: "The Defendants conceded that the universe of documents provided to the trial court included records with individually identifiable student information. The District responded that this concession still neglected to identify that attorney Mell had received the unredacted client-provided documents in violation of FERPA.").

[7] CP 106-107 (McMinimee Oct. 2, 2014 Ltr. rejecting appointment of a mediator and ALJ and insisting upon court intervention.); RP Nov. 7, 2014 at 11 - 13.

[8] CP 817 (Mell Dec. 3, 2014 Dec. attesting to delivery of DVD to District).

Ultimately the trial court carefully reviewed the facts of this case and properly dismissed it as meritless.[9] The trial court properly identified and protected the privilege, and client confidentiality.[10] The Lincoln Ladies and their attorney accept the factual statement set forth in the Order on Motion for Summary Judgment with few exceptions. The first exception concerns who redacted the records, which is not ultimately dispositive.[11] The second concerns the suggestion that Mell made representations or filed photographs showing that original records were removed from the District and given to her.[12] No such representation was made, but this misperception came from the District's erroneous

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[9] CP 648 - 663 (Order on Summary Judgment).

[10] CP 529. See also, Order on Writ at Supp. CP 201 -203.

[11] CP 649 at fnt. 5: The District never learned that attorney Mell was the one who redacted the identifying information from the records attached to the whistleblower complaint. The Lincoln Ladies and attorney Mell have never disclosed who redacted the attachments to the whistleblower complaint. CP 584 (Gavigan Nov. 2014 Dec.); CP 588 (Pete Nov. 2014 Dec.); CP 592 (McGatlin Nov. 2014 Dec.). The District has simply stated it to be the case without any such knowledge and the reviewing courts have accepted the District's characterization to be correct when the District does not know this fact to be true. There has never been any fact finding hearing in this case.

[12] CP 651 (Order on Summary Judgment); RP Nov. 14, 2014 at 5 - 7 ("I didn't go onto their laptop and try to recreate and download every file folder they had. What we decided to do was focus on what we believed was the concern of the school district and would be records that the school district may no longer have access to because the individuals had it either on paper or in electronic communications that they forwarded to their personal e-mail accounts.") Counsel did not access the computers as stated to the court. RP April 10, 2015 "I told the Court, I did not go into their computers and try to take files from their computers." The photographs depicted paper files that were NOT duplicated.

representations to the trial court that were never clarified by fact finding.[13] The Special Master never reviewed the DVD or any other records to correct this incorrect perception.[14] No original records were ever removed from the District.[15]

On August 28, 2014, Superintendent Santorno received by e-mail sent from Pete's personal e-mail the Lincoln Ladies' whistleblower complaint with attachments.[16] The fourteen attachments contained forty-five pages.[17] Attachments 1 - 7, 12, 13, and 14 are e-mails to the Lincoln Ladies, with some corresponding redacted schedules, transcripts, and a waiver. Attachment 9 is a redacted course request form. Attachment 10 is a redacted schedule and transcript. Attachment 8 is a TNT news story. These documents were sent through the District e-mail to include the

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[13] RP Dec. 12, 2014 at 11. ("...when I opened up the DVD, I was overwhelmed as well. However, there are five documents that are interesting to note and they appear to be original photographs. And within those original photographs of documents are all these files and file cabinets, and one bag appears to contain student test data. It looks like testing. Now, based on what attorney Mell represented on of the other hearings, this is all information that's been transferred over to her office.") The District was incorrect about the prior representations of counsel and was incorrect about the records depicted in the photographs being in the possession of counsel. The photographs depict what was NOT duplicated due to volume and scope. The DVD contained the universe of working papers from the counselor's current binders and from digital working papers.

[14] The District incorrectly suggests the Special Master reviewed the records, but he did not. App. Br. at 8; CP 1012 - 1013.

[15] CP 585 (Gavigan Nov. 2014 Dec.), 589 (Pete Nov. 2014 Dec.), 593 (McGatlin Nov. 2014 Dec.); RP Nov. 7, 2014 at 8 - 10.

[16] CP 38 - 48, and Supp. CP 677 - 722.

[17] Supp. CP 677 - 722

waiver and transcripts (unredacted) to multiple recipients to include Pete and McGatlin.[18] They did not obtain this documentation by accessing any restricted cumulative files. Nor did they access this information because their attorney told them to go find such records. In practice, the Lincoln Ladies have access to District e-mail and other work related school records remotely routinely. The District authorizes them to work from their assigned laptops at home.[19] In addition, the counselors prepare each year binders that contain student schedules, transcripts, waivers, and other pertinent details on individual students that the counselors take home and use to familiarized themselves with student needs, and to prepare themselves to effectively counsel families and students.[20]

The other records at issue when the District filed suit were the 2013 adverse performance evaluations AP Burke wrote up on Pete and McGatlin that contained student transcripts and other references to students by name.[21] The District sent these records unredacted to Pete and McGatlin.[22] Later after the District filed suit and demanded to see all the

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[18] CP 677 - 683, 685 - 686, 703 - 704, 707 - 708.

[19] CP 585, 589, 593; RP Nov. 14, 2014 at 5 - 6.

[20] *Id.*

[21] CP 801 (Mell Dec. Designating Records - 2014 Burke Evaluations of McGatlin and Pete at CR 26 Submissions 000073 - 191., See, DVD filed under seal.); RP Nov. 7, 2014 at 10.

[22] CP 801.

records the Lincoln Ladies possessed, and after the court ordered the universe of working papers disclosed to the court, the records at issue expanded. The District received copies of copies of the Lincoln Ladies' working files on December 3, 2014 pursuant to the Court's order.[23] The Lincoln Ladies never disclosed what records were shared among them with counsel prior to the courts order.[24] After the court ordered disclosure of the universe of records to the court, then counsel affirmed the universe included protected information and all parties received copies to be kept under seal and sequestered.[25]

The Lincoln Ladies and counsel take issue with the fact that their request for immunity under RCW 4.24.510 was never addressed despite its prevalence in their motions from the outset.[26] Unfortunately both judges failed to address the statutory immunity that entitled the Lincoln Ladies and their attorney to an award of attorney's fees, costs, and statutory penalties. Such relief is warranted and should be granted on appeal.

IV. ARGUMENT

A. Response to District's Appeal

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[23] CP 652, 816; RP Dec. 3, 2014.

[24] RP Nov. 14, 2014 at 9.

[25] RP Nov. 14, 2014 at 9.

[26] CP 480 (Response to Show Cause); CP 8 (Motion to Dismiss); CP 58 (Motion for Summary Judgment Dismissal); CP 280 (Reply Brief on Summary Dismissal).

1. Segregation and Identification of **The** Records Shown To Counsel Invades the Confidential Attorney-Client Relationship

The District invades the confidential attorney-client relationship when seeking to enforce a pre-empted erroneous order that compelled the Lincoln Ladies and their attorney to show the District what records they shared and in what form.[27] The District demands disclosure of communications, not records.[28] The District's query violates the purpose for the attorney-client privilege wherein a lawyer as advocate and counselor needs to know all that relates to the client's reasons for seeking representation. "[t]he purpose of the privilege is to encourage clients to make full disclosure to their attorney…the privilege exists to protect not only the giving of professional advice…but also the giving of information to the lawyer to enable him to give sound and informed advice…"[29] "The

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[27] Client confidences must be protected even if not privileged so as to not cause the client embarrassment or harm. *Chubb & Son v. Superior Court*, 228 Cal. App. 4th 1094, 176 Cal. Rptr. 3d 389 (2014).

[28] The District essentially asks the following: Did you show your attorney confidential student educational records protected by FERPA? See ftnt. 37. The District expects the Lincoln Ladies to incriminate themselves or have their attorney incriminate them if such consultation amounts to an actual disclosure. The Lincoln Ladies and counsel do not concede that showing counsel documents amounts to a protected disclosure. *See argument below*. The Lincoln Ladies and their attorney understood the District intended to suspend them for consulting with counsel and therefore refused to answer on privilege/ confidentiality grounds from the date the District first demanded an answer on September 3, 2014 to the present date. *See Marshall v. D.C. Water & Sewage Auth.*, 218 F.R.D. 4 (D.D.C. 2003)(No discovery of what documents were provided to counsel because that would reveal analytical process of counsel regarding what was needed to answer discovery.)

[29] *Upjohn Co. v. U.S.*, 449 U.S. 383, 389, 101 S. Ct. 677 (1981).

attorney-client privilege exists to encourage free and open attorney-client communication by creating an assurance to the client that his communications will not be disclosed to others."[30] "The privilege is imperative to preserve the sanctity of communications between clients and attorneys."[31] "[t]o require the counsel to disclose the confidential communications of his client to the very court and jury which are to pass on the issue which he is making, would end forever the possibility of any useful relation between lawyer and client."[32] The trial court correctly rejected the District's efforts to invade the attorney-client relationship when it examined the records at issue in camera and concluded segregation to identify only those records shown to counsel would violate client confidences.

The *Soter* case the District cites fails to address the confidentiality issue raised here where the District does not want the records, the District wants to know whether confidential records were shown to counsel.[33] *Soter* is a public records case, not a FERPA nor replevin action.[34] The

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[30] *Pappas v. Holloway*, 114 Wn.2d 198, 203, 787 P.2d 30 (1990).

[31] *Dietz v. Doe*, 131 Wn.2d 835, 851, 935 P.2d 611 (1997).

[32] *Dike v. Dike*, 75 Wn.2d 1, 10, 448 P.2d 490 (1968) (quoting Henry S. Drinker, Legal Ethics 133 (1953). *Dana v. Piper*, 173 Wn. App. 761, 770, 295 P.3d 305, 310 (2013) review denied.

[33] Ftnt. 6.

[34] *Soter v. Cowles Pub. Co.*, 162 Wn.2d 716, 174 P.3d 60 (2007).

Soter court does not address the problem here where the District already has the records and knows the contents. Instead the District seeks to identify whether a subset of those records considered confidential under FERPA were shown to counsel. The *Soter* court held "communications" are protected, which the District concedes, while refusing to acknowledge that the act of segregating which documents were shown to counsel and in what form is the disclosure of a confidential communication.[35] The District claims the records are "indisputably student educational records under FERPA", without knowing what records were provided to counsel and in what form, which is information that the District simply is not entitled to find out.

The District relies upon and cites to the *Dietz* case.[36] In *Dietz*, the court analyzed the legal advice exception for purposes of deciding whether an attorney could disclose the name of a client without breaching client confidentiality. Normally, the client's name is not confidential; however, where disclosure of the client's name is material for purposes of showing an acknowledgment of guilt or wrongdoing then such disclosure is protected.[37] The court adopts a seven part test for the legal advice

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[35] App. Br. at 11.

[36] *Dietz v. Doe*, 131 Wn.2d 835, 842, 935 P.2d 611 (1997)

[37] *Dietz* at 846.

exception, which the District does not analyze; however the factors favor a privilege finding here.[38] The Lincoln Ladies sought legal advice from counsel in her capacity as an attorney in order to obtain legal advice in confidence without disclosure of what was advised, and the protection was never waived.[39] The District asks the Lincoln Ladies and their attorney to reveal what was communicated to establish a FERPA violation to impose discipline to silence their whistleblowing. The District may not compel the Lincoln Ladies to implicate themselves, nor may the District compel their attorney to implicate them in the District's alleged FERPA disclosure without compromising the policy objectives of the attorney-client privilege. The attorney-client privilege exists to allow a client to communicate freely with an attorney without fear of compulsory discovery.[40]

2. District's Requested Relief Violates the First Amendment

The District asks to impair the First Amendment rights of the Lincoln Ladies and their counsel. The District argues for a new rule of

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[38] (1) The client must have sought legal advice; (2) from the attorney in his or her capacity as an attorney; (3) the communication must have been made in order to obtain legal advice; (4) in confidence; (5) by the client; (6) the client must wish to protect the client's identity; (7) from disclosure; and (8) the protection must not have been waived. *Dietz* at 849.

[39] CP 583, 587, 591-592.

[40] *Dietz* at 842.

law requiring court intervention or other preclearance in advance of legal counsel viewing confidential records with a client.[41] The District fails to distinguish existing law that holds against imposing preclearance requirements because such a requirement violates the First Amendment.[42] Such a rule of law is untenable, and restricts access to meaningful legal advice.[43] The right to retain and consult with an attorney implicates "clearly established First Amendment rights of association and free speech."[44] The First Amendment incorporates the right to consult an attorney to meaningfully access the judicial process.[45] "An attorney's

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[41] App. Br. at 15-16.

[42] *Jacobs v. Schiffer*, 204 F.3d 259 (D.C. Cir. 2000), citing to *Martin v. Lauer,* 686 F.2d 24 (D.C. Cir. 1982).

[43] The District has no grounds for suggesting the trial court's holding encourages lawyers to direct their clients to bring them unlimited confidential records to examine. The record here shows very few records were attached to the whistleblower complaint, and those that were attached were carefully redacted. CP 682 ("Due to student privacy list is not attached", and later references to "Student A" "Student B" etc. FERPA does not apply to redacted records. *Brd of Trustees, Cut Bank Public Schools v. Cut Bank Pioneer Press,* 337 Mont. 229, 160 P.3d 482 (2007). Notably there has never been a fact finding hearing of any kind to support the theory that counsel, rather than the clients, redacted the records. Whether counsel or the client makes no difference to the rule of law that authorizes any party to de-identify the records to protect student confidentiality. 34 C.F.R. 99.31(b)(1). This rule offers the highest protection by burdening everyone with a duty to redact.

[44] *Eng v. Cooley,* 552 F.3d 1062, 1076 (9th Cir. 2009); cert. denied, 558 U.S. 1101 (2010) (quoting *DeLoach v. Bevers*, 922 F.2d 618, 620 (10th Cir. 1990)(The right to consult with an attorney not only implicates the Sixth Amendment but also clearly established First Amendment rights of association and free speech.)

[45] *Borough of Duryea, Pa. v. Guarnieri*, ___U.S. ___, 131 S. Ct. 2488, 2494 (2011); *In re Primus*, 436 U.S. 412, 426, 98 S. Ct. 1893 (1978). *See e.g. Martin v. Lauer*, 686 F.2d 24, 32 (D.C. Cir. 1982)("Thus, while private parties must ordinarily pay their own legal fees, they have an undeniable right to retain counsel to ascertain their legal rights"); *Denius v. Dunlap*, 209 F.3d 944, 953-54 (7th Cir. 2000).

advice makes law accessible to the client", warranting First Amendment protection.[46] Neither the attorney nor the client can be compelled to disclose information protected by the attorney client privilege.[47] In order to obtain sound legal advice, clients must be able to communicate freely with their attorneys.[48] The trial court balanced all interests and concluded correctly that the District was not entitled to the relief it requested.

3. Disclosure Unethical

The District also expects counsel to violate her ethical obligations to her clients, and threatens the educators with discipline if they do not waive their confidentiality rights.[49] The trial court correctly found it may not compel counsel or the clients to violate ethical obligations regarding confidentiality.[50] Counsel owes a duty to her clients to not verify what they gave her or in what form. And an employee has no work related duty to waive confidentiality with private counsel. Confidentiality is without exception here where there is no waiver, nor other compelling justification to order breach of client confidences. FERPA does not provide adequate

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[46] Renee Newman Knake, *Attorney Advice and the First Amendment*, 68 Wash. & Lee L. Rev. 639, 642, (2011).

[47] *Seattle NW Sec. Corp. v. SDG Holding Col*, 61 Wn. App. 725, 735, 812 P.2d 488 (1991).

[48] *Martin*, 686 F.2d at 32-33.

[49] RPC 1.6

[50] Supp. CP 648 - 663 (Order on Summary Judgment Dismissal)

cause because it is not a privacy statute that can be enforced legally.[51] Individual student privacy may be secondary to other prevailing concerns like disclosure of governmental misconduct and access to redress.[52] An educator may share confidential student records with the educator's private attorney to pursue judicial relief from contract violations or other tortious misconduct.[53] School personnel presumptively have a "legitimate educational interest" in educational records created and used to evaluate teacher performance and management of the classroom like the records at issue here, and disclosure of such records does not violate FERPA.[54]

Importantly, the Lincoln Ladies blew the whistle on matters of public concern without compromising student confidentiality. All student identifiers were redacted, and their attorney was bound to their same burdens of confidentiality, which they did not breach. The trial court properly denied the District's demands, and its order denying the District relief should be upheld.

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[51] *Gonzaga v. Doe*, 536 U.S. 273, 122 S. Ct. 2268 (2002).

[52] *Id.* (FERPA creates no personal rights to enforce under § 1983, FERPA has an "aggregate, not individual, focus, and they serve primarily to direct the Secretary of Education's distribution of public funds to educational institutions"); *Jacobs v. Schiffer*, 204 F.3d 259 (2000); *Martin v. Lauer*, 686 F.2d 24 (D.D.C. 1982)

[53] *Ragusa v. Malverne Union Free School Dist.*, 549 F. Supp. 2d 288 (2008); *C.M. R.M. v. Board of Education of The Union County Regional High School District*, 128 Fed. App'x. 876 (2008).

[54] *Medley v. Board of Educ.*, 168 S.W. 3d 398 (2004).

4. No Disclosure For Purposes of Confidentiality When Information Shared With Counsel

When an employee shares confidential information derived in the scope of her employment with the employee's own attorney, there is no disclosure that triggers a confidentiality breach because counsel must maintain client confidences.[55] In the *Fox Searchlight* case, corporate in-house counsel shared confidential client information with her own attorney for purposes of pursuing a wrongful termination suit against her employer. The grounds justifying the holding were that the employer obviously recognized in certain cases like wrongful termination the employee would seek out legal advice and share inside information with counsel; an employer's secrets are to be protected from "public" disclosure, and sharing information with counsel is a private disclosure; and whether the privileged information is disclosed in litigation is a matter the lawyer must advise the client employee about before trial. These three justifications apply here. The District knows its professionals, who chose

[55] *Chubb*, 228 Cal. App. at 1106, citing to *Fox Searchlight Pictures, Inc. v. Paladino*, 89 Cal. App. 4th 294, 106 Cal. Rptr. 2d 906 (2001); *DeNui v. Wellman*, No. 07-4172, 2008 WL 2330953, at *3 (D.S.D. June 5, 2008)(Disclosure by a physician to a personal attorney is not a public disclosure and did not violate HIPAA but rather, is a limited disclosure to personal counsel, which cannot be disclosed to a third party pursuant to the attorney-client privilege.)

to blow the whistle, likely will consult counsel.[56] Any disclosure to counsel was confidential, and not publicized.[57] And finally, to properly advise the Lincoln Ladies, counsel would need to see the involved records to give meaningful legal advice. In certain cases of wrongdoing by an employer, a balance must be established between the right to counsel and redress, and the protection of confidential information.[58] Here the District was engaged in improper governmental misconduct. The Lincoln Ladies sought legal advice as to their rights, duties, and obligations. They did not engage in any improper disclosure of confidential information. Whistleblowers must have the right to show confidential information to their attorney to get meaningful advice to access the courts and to effectively invoke their free speech rights to public participation.[59]

5. Stare Decisis Not Implicated

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[56] *See Shaffer v. Defense Intelligence Agency*, 601 F.Supp. 2d 16 (Dist. D.C. 2009) (Affirming First Amendment right to share statutorily protected documents with a personal attorney when necessary for attorney to advise employee of his rights regarding potential termination of employment and options for seeking the protection of whistleblower statutes.)

[57] CP 230 (King 5 Oct. 2, 2014 Ltr.)

[58] *General Dynamics Corp. v. Superior Court*, 7 Cal. 4th 1164, 876 P.2d 487 (1994); *Ragusa v. Malverne Union Free School Dist.*, 549 F. Supp. 2d 288 (E.D.N.Y. 2008) (FERPA protected records could be disclosed to teacher for use in her discrimination case against the district because her case outweighed student's privacy interests in the records); *Zaal v. State*, 326 Md. 54, 602 A.2d 1247 (1992)(Attorneys as officers of the court may have limited access to confidential student records in proceedings involving student sexual abuse); *C.M. R.M. v. Board of Education*; 128 Fed. App'x. 876 (W.D. Pa. 2008)(Dissemination of confidential records for purposes of IDEA litigation did not violate FERPA or student confidentiality).

[59] RCW 4.24.500.

Stare decisis doctrine applies to prior final decisions of precedent, not trial court orders modified during the course of the proceedings.[60] Stare decisis is not applicable to a trial court decision because "the findings of fact and conclusions of law of a superior court are not legal authority and have no precedential value."[61] The two cases the District cites do not support the District's argument.[62] In fact, the *Stranger Creek* court cautions that the doctrine applies to long established law, and even then the law must be adaptable to change to ensure relevance.[63]

The trial court did not "sua sponte" reverse itself as alleged by the District.[64] The trial court had before it a CR 60 Motion for Relief from the prior order that invaded the attorney-client relationship.[65]

The District's "stare decisis" argument is frivolous factually and legally because the court did not rule "sua sponte" and existing case law on point holds the doctrine does not apply to trial court rulings. The District's requested relief should be denied.

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[60] *In re Estate of Jones*, 170 Wn. App. 594, 287 P.3d 610 (2012).

[61] *Bauman v. Turpen,* 139 Wn. App. 78, 87, 160 P.3d 1050 (2007).

[62] *In re Detention of Campbell*, 139 Wn.2d 341, 986 P.2d 771 (1999); *In re Stranger Creek & Tributaries in Stevens Cty.,* 77 Wn.2d 649, 653, 466 P.2d 508 (1970).

[63] *Stranger Creek*, at 653.

[64] App. Br. at 12.

[65] CP 313.

6. Replevin Statute Does Not Provide A Statutory Vehicle to Enforce FERPA In A Civil Cause of Action - FERPA Is Not Enforceable In A Civil Cause of Action

The District essentially concedes it may not enforce FERPA as a private right of action, which is a correct legal conclusion.[66] However, the District attempts an end run around this established precedent when arguing a statutory replevin action may be used to enforce FERPA. It may not.[67] The District has not cited any legal authority to support its novel theory. There is no case where a replevin action was invoked to recover copies of work records from an employee. In this case, there is no factual nor legal basis to support a replevin cause of action. The Lincoln Ladies and their attorney do not possess records owned by the District.[68] The records are publicly owned, some exempt and some not exempt from public disclosure.[69] Additionally, any records the Lincoln Ladies have are merely copies, not original records.[70] And, they have provided duplicate

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[66] App. Br. at 13; *Gonzaga v. Doe*, 536 U.S. 273, 122 S. Ct. 2268 (2002).

[67] The District never met the statutory criteria for any relief such as identification of the specific property wrongfully possessed, and payment of a bond. RCW 7.64.020 & .035.

[68] The plaintiff in a replevin action must be able to prevail on the strength of her title or right to the exclusive possession of personal property. *Graham v. Notti*, 147 Wn. App. 629, 196 P.3d 1070 (2008). Here no personal property has ever been denied the District.

[69] RCW 40.14.010, RCW 42.56.010, RCW 42.56.320, RCW 28A.604.010.

[70] DVD of universe of records filed and sealed with the Appellate Court on discretionary review. See, Commissioner Schmidt's Order dated Jan. 27, 2015.

copies of their copies back to the District, which makes a replevin cause of action entirely moot.[71]

7. FERPA Funding Never At Risk

The District argues the application of FERPA in the factual summary of its brief; however, FERPA is a red herring to disguise the District's true objectives in bringing this SLAPP suit.[72] The District's funding was never placed at risk here. FERPA is a federal statute enacted to direct federal resources to schools that includes a provision to discourage school districts from disclosing student educational records as a policy or practice.[73] If an individual district professional seeks legal advice and shares student information with a private attorney, the District has not engaged in a policy or practice to compromise its funding in any manner.[74] The District knows the unredacted records were not released to the media. The District's contention that only the District's chosen staff can redact the records is frivolous and lacks merit, which the trial court

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[71] CP 663.

[72] RAP 10.3 precludes legal argument in a factual summary.

[73] 20 U.S.C. § 1232(g)(b)(1) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records…

[74] "FERPA's nondisclosure provisions further speak only in terms of institutional policy and practice, not individual instance of disclosure." *Gonzaga University v. Doe*, 536 U.S. 273, 122 S. Ct. 2268 (2002).

explained adeptly.[75] Additionally, there is no disclosure when a private attorney reviews documents legally in the possession of a client. Even though FERPA has been in effect for forty years or more, there is not one case anywhere that suggests FERPA is violated when school district personnel share confidential student information with private counsel. The District has no authority to justify its SLAPP suit.

8. Sequestration and Destruction Appropriate Protection

The Lincoln Ladies and their attorney are bound to sequester any copies of records they may possess to protect confidentiality.[76] Upon completion of this dispute and the corollary cases, the records will be destroyed. Sequestration and subsequent destruction are commonly recognized adequate protective measures for confidential records.[77] Additionally, the ethical obligations of the Lincoln Ladies and their attorney to protect student and client confidentiality continue indefinitely, regardless of the dismissal of this case, and regardless of any court order. The records remain protected and no further relief is required. The District's appeal lacks merit and should be dismissed.

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[75] CP 662.

[76] RP Nov. 7, 2014 at 12 -13; and Supp. CP 201 - 203 (Order on Writ).

[77] CR 26 (6)(c): After being notified, a party must promptly return, **sequester, or destroy** the specified information. CR 45(d)(1)(B).

B. Cross Appeal

1. District's SLAPP Suit

The District's meritless lawsuit was at its inception a strategic lawsuit against public participation ("SLAPP"). A SLAPP suit is a civil lawsuit "used to intimidate citizens from exercising their First Amendment rights and rights under article I, section 5 of the Washington State Constitution."[78] SLAPP suits typically are meritless like this one.[79] And, SLAPP suits deplete defendant's resources and energy, and generally detract defendants from their objectives, which are adverse to the plaintiff.[80] The District sued its employees and their attorney to silence them and others who may speak out, and to punish them for taking public the misconduct of District officials. This improper purpose is evident for multiple reasons. First, the timing. The District filed suit about thirty days after the media publicized the Lincoln Ladies' whistleblower complaint.[81] Second, the District's refusal to appoint an administrative

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[78] *Segaline v. State, Dept. of Labor and Industries*, 169 Wn.2d 467, 473, 238 P.3d 1107 (2010). RCW 4.24.510. Notes: Intent — 2002 c 232.

[79] *Dowling v. Zimmerman*, 85 Cal. App. 4th 1400, 103 Cal. Rptr. 2d 174 (2001). Washington courts may consider California cases where the protections are similar to Washington's protections. *Davis v. Cox*, 183 Wn.2d 269, 351 P.3d 862 (2015).

[80] *Id.*

[81] CP 1, date of filing Oct. 2, 2014. Media coverage September 2, 2014, see screen shots of coverage at Supp. CP 252 - 254, showing redacted records.

law judge or utilize other dispute resolution alternatives.[82] Third, the District's relentless pursuit of confidential information when it knows its funding is not at risk. The District continues to press for identification of what was communicated to counsel even after learning the media never received nor published any unredacted records[83]; even after the records were sequestered; even after the Lincoln Ladies provided the District copies of all their working papers; even after receiving assurances the records would be destroyed upon resolution of the correlated cases; and even after the U.S. Department of Education has not threatened its funding. Fourth, the District insists that its employees have no right to share confidential information with private counsel. And fifth, the District's own arguments: specifically that the risk of harm with the trial court's decision is that it encourages professionals to disregard student confidentiality with "unfettered discretion", or make "ad hoc" disclosures to attorneys, or publish "crudely redacted records" in the media to support a whistleblower complaint, or that attorneys will "solicit" confidential information when advising educators.[84] Thus, the District's own actions,

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[82] CP 106-107 (McMinimee Oct. 2, 2014 Ltr. rejecting appointment of a mediator and and ALJ and insisting upon court intervention.); RP Nov. 7, 2014 at 11 - 13.

[83] Supp. CP 230, 252-254.

[84] App. Br. at 2, 16 - 17.

the relief it requests, and the arguments it makes in support of its appeal show the District's meritless case is a strategic lawsuit against public participation. The District should be sanctioned. The trial court erred when it did not address anti-SLAPP immunity under RCW 4.24.510.[85]

2. Lincoln Ladies and Their Attorney Immune From Suit

The Legislature codified a statutory immunity to protect individuals who exercise their free speech rights.[86] Courts are expected to dismiss SLAPP suits early on, rather than allow the matter to proceed.[87] When a trial court properly recognizes at the inception of a case this statutory immunity, the immunity not only prevents the threat of damages but also precludes severely burdensome defense costs like those the District has imposed here.[88] The trial court erred when failing to dismiss the case early on.[89]

Anti-SLAPP immunity shields a person who communicates a complaint or information to any branch or agency of federal, state, or local

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[85] CP 663.

[86] RCW 4.24.510. This statutory immunity remains in effect, and is not void like the later 2010 anti-SLAPP special motion to strike procedures at RCW 4.24.525. *See, Davis v. Cox*, 183 Wn.2d 269, 351 P.3d 862 (2015), and *Lowe v. Rowe*, 173 Wn. App. 253, 294 P. 3d. 6 (2012) that relies upon RCW 4.24.500 and .510.

[87] *Id.*

[88] RCW 4.24.500.

[89] RP Nov. 7, 2014 at 18. Despite immediate and subsequent motions under RCW 4.24.510 the trial court never addressed Section .510 immunity in any order or ruling.

government from civil liability for claims based upon the communication to the agency or organization regarding any matter reasonably of concern to that agency or organization.[90] "[A]s long as the petitioning is aimed at procuring favorable government action, result, product, or outcome, it is protected and the case should be dismissed."[91] Communication of potential wrongdoing is "vital to the efficient operation of government."[92] First Amendment protections extends to educators who blow the whistle on improprieties in public education.[93] There is "considerable value" … "in encouraging, rather than inhibiting, speech by public employees."[94] "Government employees are often in the best position to know what ails the agencies for which they work."[95] It is "as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it."[96] The Lincoln Ladies and their attorney are immune.

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[90] RCW 4.24.510.

[91] RCW 4.24.510 NOTES: Intent—2002 c 232

[92] RCW 4.24.500. In 2002 the Legislature repealed the "good faith" element, and limited the "good faith" factor exclusively to assessing the statutory penalty. *DiBlasi v. Starbucks Corp.*, 414 Fed. App'x. 948 (9th. Cir. 2011); *Bailey v. State*, 147 Wn. App. 251, 262, 1919 P.3d 1285 (2008).

[93] *Lane v. Franks*, 134 S. Ct. 2369 (2014)(Director of community college's program for underprivileged youth reported wage payments made to a public official who was not actually appearing at work.).

[94] *Lane* at 2377.

[95] *Id.*

[96] *Id.*

The Lincoln Ladies filed a formal whistleblower complaint with the District, and shared their concerns about governmental misconduct at Lincoln High School after the District refused to investigate their whistleblower complaint.[97] The Lincoln Ladies petitioned government to procure equitable educational opportunities for students at Lincoln High School.[98] Equitable educational opportunities for all students is a constitutional obligation of the District.[99] In response, the District sued them, rather than investigate their complaint. The District's complaint states the purpose of its lawsuit was to stop three whistleblowers and their attorney from the "possession and dissemination" of "protected student educational records" without its consent.[100] The District refused consent and all efforts to act on the whistleblower report. The District's suit included the false allegation that the Lincoln Ladies and their attorney shared confidential student educational records with the media.[101] The media covered the whistleblower complaint.

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[97] CP 38, 66.

[98] CP 48 - 49.

[99] WASH. Const. art. IX § 1.

[100] CP 2 - 3.

[101] CP 3.

When the Lincoln Ladies appeared and defended themselves, the District amended its complaint and sued them again for responding to the court ordered disclosure of records.[102] The District based its Amended Complaint upon the testimony of counsel and her corresponding filing of records with the court.[103] The District's allegations were not well grounded in fact. The Lincoln Ladies' representative never told the Court that she took original records from the District, which is evident from the verbatim report of proceedings.[104] In two instances, the District filed baseless claims against the Lincoln Ladies and their attorney detracting from the inequity issues in play at Lincoln High School. The District's lawsuit arose from communications with the District and with the Court on matters of reasonable concern to each. The District filed and then refiled an amended SLAPP suit.

The District defends claiming communications between a client and the client's attorney are not protected by anti-SLAPP immunity. The Legislature has directed the courts to liberally construe SLAPP immunity to effectuate its general purpose of protecting participants in public

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[102] CP 596.

[103] *Id.*

[104] See ftnts. 11 & 12.

controversies from an abusive use of the courts.[105] However, it is improper for the court to defer to the plaintiff's express purpose for its lawsuit. Instead the court must ascertain the "principal thrust" or "gravaman" of the complaint by considering the pleadings, and supporting and opposing affidavits and the surrounding circumstances.[106]

An attorney's advocacy is within the scope of anti-SLAPP immunity.[107] Communicating with an attorney is a protected activity covered by the First Amendment.[108] The courts may rely upon First Amendment case law when construing anti-SLAPP immunity.[109] Where the plaintiff's cause of action "targets conduct that advances and assists" the defendants' exercise of a protected right, then the cause of action targets the exercise of that protected right.[110] There is an inextricable correlation between the communications with counsel and the whistleblower complaint that justifies anti-SLAPP immunity. Similarly,

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[105] *Johnson v. Ryan,* 186 Wn. App. 562, 346 P.3d 789 (2015).

[106] *Baseball Club of Tacoma v. SDL Baseball Partners, LLC*, 187 Wn. App. 519, 528, 348 P.3d 1283 (2015).

[107] *Dowling v. Zimmerman*, 85 Cal. App. at 1420.

[108] Ftnt. 17.

[109] *City of Seattle v. Egan*, 179 Wn. App. 333, 317 P.3d 568, 570 (2014).

[110] *Davis v. Cox*, 180 Wn. App. 514, 325 P.3d 255 (2014), quoting *Greater LA. Agency on Defness, Inc. v. Cable News Network*, 742 F.3d 414 (9th Cir. 2014), reversed on grounds that special motion to strike process described under RCW 4.24.525 violates right to a jury trial, *Davis v. Cox*, 183 Wn.2d 269, 351 P.3d 862 (2015).

there is an express link between counsel's representations to the court, and the amended complaint that justifies anti-SLAPP immunity.

When interpreting a statute, the courts look at the statute's plain language and ordinary meaning.[111] Sharing information with private counsel to successfully blow the whistle or to seek redress before the court comports with the plain language of the anti-SLAPP immunity statute. The statute extends immunity to communications with "any branch" of state government.[112] Lawyers are officers of the court.[113] Lawyers are part of the judicial branch of state government subject to its regulatory powers.[114] The Lincoln Ladies and their attorney should have been dismissed from the District's meritless lawsuit at the outset.

3. Lincoln Ladies and Their Attorney Are Entitled to Anti-SLAPP Remedies

In conjunction with immunity from suit, Washington's anti-SLAPP statutes entitles a prevailing party to recovery of reasonable attorney's fees, costs, and a $10,000.00 statutory penalty.[115] The Lincoln Ladies and

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[111] *Davis v. Cox*, 183 Wn.2d 269, 280, 351 P.3d 862 (2015).

[112] RCW 4.24.510.

[113] RPC Preamble: A lawyer, as a member of the legal profession, is a representative of clients, and officer of the court and a public citizen having special responsibility for the quality of justice. RPC 3.3 Comment [2] This Rule sets for the special duties of lawyers as officers of the court… RCW 2.48.220.

[114] *Washington State Bar Ass'n v. State*, 125 Wn.2d 901, 890 P.2d 1047 (1995); *In re Littel*, 40 Wn.2d 421, 244 P.2d 255 (1952).

[115] RCW 4.24.510.

their attorney request an award of all of their attorney's fees, costs, and a statutory penalty of $10,000.00 to each of them. The award is not discretionary, but rather is required.[116] The Lincoln Ladies and their attorney were at all times communicating in good faith, which entitles each of them to the statutory penalty of $10,000.00. There are no grounds to deny them this relief. This court should affirm dismissal on immunity grounds under RCW 4.24.510, impose the statutory penalty, appellate fees and costs, and remand to the trial court to award reasonable trial court attorney's fees and costs.

C. Attorney's Fees and Costs At Trial Level and On Appeal

1. Trial Court Fees and Costs

The Lincoln Ladies and their attorney request an award of attorney's fees and costs at the trial court level pursuant to the provisions of RCW 4.24.510. They are immune from suit and should recover against the District because the District filed a SLAPP suit against them.

In addition, they should recover attorney's fees and costs because the District's suit was filed in "bad faith" and for purposes of harassing and intimidating the Lincoln Ladies, and to disrupt and interfere with their

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[116] *Bailey v. State*, 147 Wn. App. 251, 191 P.3d 1285 (2008); *Gontmakher v. The City of Bellevue*, 120 Wn. App. 365, 85 P.3d 926 (2004); *Right-Price Recreation, LLC v. Connells Prairie Community Council*, 146 Wn.2d 370, 46 P.3d 789 (2002).

right to representation. The District's appeal is wholly without merit and was filed in bad faith because the case was from its inception a SLAPP suit.[117] In addition, FERPA may not be enforced in a civil suit, yet that is the theory the District relied upon.[118] Also, its replevin theory had no merit where there were no original documents owned by the District removed from the District, and where the District received the copies of the copies of records on or about December 3, 2014 so there was nothing for the District to recover.[119] The District never intended to recover any documents, but rather has used this case to attempt to invade and disrupt the confidential relationship between the Lincoln Ladies and their attorney, which should be sanctionable.[120]

The District's suit amounts to substantive and procedural bad faith. Substantive bad faith warrants an award of attorney's fees and costs to deter against intentional pursuit of a frivolous case or claims with an improper motive.[121] Procedural bad faith means vexatious conduct during

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[117] A frivolous basis for an award of attorney's fees and costs exists if there are no debatable issues on which reasonable minds can differ and the appeal is so totally devoid of merit that there is no possibility of reversal. *Harrington v. Pailthorp*, 67 Wn. App. 901, 841 P.2d 1258 (1992).

[118] Supp. CP 658 - 652.

[119] Supp. CP 663.

[120] CP 583, 588, 592.

[121] *Rogerson Hiller Corp. v. Port of Port Angeles*, 96 Wn. App. 918, 927, 982 P.2d 131 (1999).

the course of litigation, to include delays and obfuscation.[122] The District filed factually unsupportable allegations that the media received confidential records, when the District knew it did not. And the District mischaracterized counsel's communications with the court, and refused to acknowledge the court ordered disclosure of records to it to erroneously attempt to justify its meritless case.

An award of attorney's fees and costs would encourage professionalism and cooperation, and would deter the District from abusing the court processes in the future to harass and intimate its professionals or to otherwise silence them. It would encourage the District to appoint an administrative hearing officer when asked as required by its own policies[123], or utilize alternative dispute resolution processes as the Lincoln Ladies invited it to do[124] rather than pursuing contentious litigation that has no merit.

The Lincoln Ladies and their attorney should be awarded their costs and attorney's fees incurred at the trial court level.

2. Appellate Court Fees and Costs

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[122] *Id.*

[123] CP 64.

[124] CP 102 - 105.

The Lincoln Ladies and their attorney request an award of attorney's fees and costs on appeal pursuant to RCW 4.24.510, RAP 18.1 to include having to defend against the District's baseless and frivolous arguments, and pursuant to the common law equity grounds of bad faith.

As previously stated, the Lincoln Ladies and their attorney are entitled as a matter of right to an award of reasonable attorney's fees and costs on appeal under RCW 4.24.510 because they are immune from the District's SLAPP suit.

In addition, the District's appeal is brought in bad faith and is frivolous for all the same reasons as set forth above in support of an award of fees and costs at the trial court level. In addition on appeal, the District argued without merit the doctrine of stare decisis, when clearly established case law indicates no such argument applies.[125]

The Lincoln Ladies and their attorney should be awarded their attorney's fees and costs on appeal.

V. CONCLUSION

The District's appeal should be dismissed. This lawsuit was a SLAPP suit from its inception, and was filed and amended in bad faith. This Court should find immunity on the cross-appeal under RCW 4.24.510

[125] Ftnt. 60 & 61.

and award attorney's fees, costs at the trial level and on appeal and a statutory penalty of $10,000.00 a piece to each Respondent.

Dated this 26th day of September, 2016 at Fircrest, WA.

III Branches Law, PLLC

Joan K. Mell, WSBA #21319
Attorney for Lincoln Ladies

Wayne Fricke, WSBA #16550
Attorney for III Branches

CERTIFICATE OF SERVICE

I, Misty M. Carman, certify as follows:

I am over the age of 18, a resident of Pierce County, and not a party to the above action. On the 27th day of September, 2016, I caused to be filed and served true and correct copies of the above III BRANCHES, PLLC, TRUBY PETE, SHEILA GAVIGAN AND KATHY MCGATLIN-RESPONDENTS' BRIEF AND OPENING BRIEF ON CROSS APPEAL and this Certificate of Service; on all parties or their counsel of record, as follows:

Via Electronic-Mail:

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Original E-filed with:

Court of Appeals, Division II, coa2filings@courts.wa.gov

I certify pursuant to penalty of perjury under the laws of the State of Washington that the above information is true and correct.

Dated this 27th day of September, 2016 at Fircrest, WA.

Misty M. Carman, Paralegal

III BRANCHES LAW

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